

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of John Hansen for a)
Permit to Place Piers and Construct)
a Marina on the Bed of the Rock River,)
Town of Beloit, Rock County, Wisconsin)

Case No. 3-SD-94-3035

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice hearing was held on September 16, 1996, at Janesville, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

John Hansen, Applicant
49 Ski View Drive
Beloit, WI 53511

Town of Beloit, by

Kenneth Forbeck, Attorney
Forbeck & Monahan, S.C.
2715 Riverside
Beloit, WI 53511

Green/Rock Audubon Society, by

Bill Hallstrom, Chairman
2042 Meridith Drive
Beloit, WI 53511

Wisconsin Department of Natural Resources

Michael Cain, Attorney
P. O. Box 7921
Madison, WI 53707-7921

B. G. Rosander
2229 Pow Wow Trail
Beloit, WI 53511

FINDINGS OF FACT

1. John Hansen, 49 Ski View Drive, Beloit, Wisconsin, 53511, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place marina piers on the bed of the Rock River, Town of Beloit, Rock County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the SE 1/4 of SW 1/4 in Section 11, Township 1 North, Range 12 East, Rock County. The above-described property abuts the Rock River which is navigable in fact at the project site.

3. The applicant proposes to construct 2 styrofoam\wood piers six feet wide, extending approximately 150 feet lakeward below the ordinary highwater mark. Each of the two long piers would have a 30 foot long "T" at each end. Further, each pier would have 5 lateral pier extensions each 2 foot wide by 15 feet in length. The piers would occupy nearly the full length of the approximately 133 feet of riparian frontage owned by the applicant. The two piers would accommodate approximately 30 pontoon style boats. The applicant intends to rent these slips to the public on a seasonal basis.

4. The purpose of the proposed project is the creation of a rental berthing/docking facility containing slips for up to thirty pontoon boats. The proposed project would far exceed the "reasonable use" guidance threshold of 3 to 4 slips for a riparian parcel of this size. (Amundsen) Under certain circumstances, the DNR allows more slips for a project which makes seasonal rentals available to non-riparian members of the public. However, Amundsen testified that he would not recommend any increase from the reasonable use threshold in this case because of concerns about possible hazards to navigation described below. Considering the record as a whole, construction of slips accommodating 30 boats would exceed the reasonable use of this riparian parcel, despite the intention to make the slips available to the public by seasonal rental.

5. The proposed structures could materially obstruct existing navigation on the Rock River. The river is very narrow in the area around the proposed project site. There is only approximately 500 feet of water deep enough to navigate in the area of the river west of the proposed project. The 150 foot pier and associated boat traffic would allow little margin for error for navigational traffic along the river in the area. DNR Warden George Protogere testified that the river is very shallow in the area of the proposed project. Further, there is an island obstruction northwest of the proposed pier project. (Ex. 52) There are tree stumps in the area west of the proposed project and very shallow water, making boating extremely difficult. Protogere reviewed the project in light of these natural features and concluded that, "(i)f the piers were placed out 150 feet, a good portion of the main channel of navigation would be jeopardized. Since travel is only on one side of the island, there would be increased congestion in the area due to the amount of slips for the piers and the decreased navigation channel." (Ex. 64; See also: Ex. 73)

The applicant has not carried his burden of proof in demonstrating that the project would not "materially obstruct navigation" within the meaning of sec. 30.12, Stats.

6. Mr. Bill Hallstrom testified that the project would have a detrimental impact on natural scenic beauty, especially as it relates to the view of the river from the City of Beloit's Big Hill Park. The DNR Area Water Management Specialist, Clark Amundsen concurred that the project would have a detrimental impact on natural scenic beauty, although not sufficient in itself to lead to a denial of the permit application. The record supports Amundsen's position on this issue.

7. Mr. Amundsen testified that the proposed project would not have a detrimental impact on fishery values in the area in and around the project site. However, both Amundsen and Protogere expressed concerns that the large piers extending into the river could have a detrimental impact on the ability of people to fish the river near the project site.

8. The project would require several permits which were not the subject of the hearing held on September 16, 1996. The project would require the filling of an area of wetlands (a 425 foot area from the river's edge to the highway-side boundary, and another 75 foot long area near the boundary with the Lengjak property) and would accordingly require a water quality certification as yet unreceived from the Department. The record suggests that there would be some secondary detrimental impacts on the river if in fact the wetlands were filled. The Department and the Town of Beloit object to the proposed project because of these concerns. Mr. Jean-Paul Lengjak, the neighboring riparian due south of the applicant, also objects to the project in large part because of the proposed area of wetlands to be filled.

Mr. Dale Simon, a DNR Water Regulation Chief Biologist, provided un rebutted expert testimony that the above-described portions of the project area were wetlands under Wisconsin law. Further, the record supports a finding that there would be detrimental secondary and cumulative impacts to the functional values of these wetlands if the instant permit were granted. Specifically, the proposed fill would have a detrimental impact on wildlife habitat (Folley and Simon). The applicant has not carried his burden of proof in demonstrating that the project would be "not detrimental to the public interest" in maintaining and preserving wetland functional values.

9. The Town noted that the proposed project would require a conditional use permit under local zoning ordinance. The Town also raised the issue of whether the proposed commercial marina would require a highway access permit. However, the ALJ does not rely on these problems in denying the instant permit application.

10. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

11. The proposed structures will not reduce the effective flood flow capacity of the Rock River.

12. The proposed structures will not adversely affect water quality nor will they increase water pollution in the Rock River. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats.

13. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to deny a permit for the construction and maintenance of structures on navigable waters which do not meet the standards set forth in sec. 30.12(2), Stats..

2. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

3. The proposed facilities described in the Findings of Fact constitute "structures" within the meaning of sec. 30.12, Stats.

4. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried its burden of showing that the proposed project would not "materially obstruct navigation" on the Rock River and would be "not detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats.

5. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the proposed permit be DENIED, for the reasons stated above.

Dated at Madison, Wisconsin on November 19, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.